BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LARRY D. THATCHER Claimant	)	
VS.	)	
THE BOEING COMPANY Respondent	)	Docket No. 1,023,921
AND	)	
INDEMNITY INSURANCE CO. OF NORTH AMERICA Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the February 20, 2007, Award entered by Special Administrative Law Judge John C. Nodgaard. The Board heard oral argument on May 18, 2007. Dennis L. Phelps, of Wichita, Kansas, appeared for claimant. Eric K. Kuhn, of Wichita, Kansas, appeared for respondent.

The Board has considered the record and adopted the stipulations listed in the Award.

The Special Administrative Law Judge (SALJ) found the date of accident to be May 16, 2005. The SALJ further found that claimant sustained a 2 percent permanent partial impairment to the body as a whole and a 69 percent task loss based on the testimony of Dr. Michael Munhall. The SALJ concluded that claimant had not made a good faith effort to find employment and found that claimant retained the ability to earn $625 per week, including fringe benefits, which computed to a 65 percent wage loss. Accordingly, the SALJ awarded claimant a work disability of 67 percent.

The SALJ further concluded that the funds contained in claimant's Voluntary Investment Plan (VIP) were not benefits paid by reason of age or years of service and, therefore, respondent was not entitled to an offset for the withdrawals made by claimant.

ISSUES

Respondent requests review of the nature and extent of claimant's disability. Respondent argues that claimant's repetitive use injuries continued to worsen after his employment at respondent ended and for months while employed by Spirit Aerosystems, Inc. (Spirit). Respondent contends that, at the least, claimant has not met his burden of proving what portion of his injuries and disability should be placed on respondent. In the alternative, if the Board finds that claimant has proven a claim against respondent, respondent argues that claimant is not entitled to a task loss because he could not authenticate the tasks listed on Jerry Hardin's task loss assessment. Respondent asserts also that claimant is not entitled to a general body disability or a work disability and that pursuant to *Casco*,[1] claimant is only entitled to an award based on two scheduled injuries to his upper extremities. Although in its brief respondent also argued that it is entitled to a credit for its portion of claimant's 401(k) withdrawals from his retirement account, respondent withdrew this issue during oral argument to the Board. Accordingly, the Board adopts and affirms the SALJ's conclusion that the VIP funds were not retirement benefits under K.S.A. 44-501(h). The SALJ found that claimant's repetitive use injuries to his bilateral upper extremities resulted in a 2 percent impairment to the body as a whole (a permanent partial general body disability). However, the parties agreed this whole body rating is based upon Dr. Munhall's opinion that claimant suffered a 2 percent permanent impairment of function to each upper extremity and that Dr. Munhall's rating is the only expert medical opinion on impairment percentage that is in evidence. Therefore, the parties also agreed during oral argument that claimant's percentage of functional impairment was not an issue. The only issue concerning functional impairment is whether claimant's disability should be compensated based on two separate scheduled injuries to the upper extremities or as a general body disability.

Claimant argues that respondent's pretrial stipulation that claimant's date of injury was May 16, 2005, is binding, since respondent did not seek permission to withdraw the stipulation. Claimant also states the evidence does not show that his injuries were permanently worsened by work activities after respondent sold its operation to Spirit in June 2005. In response to respondent's argument that claimant is not entitled to a task loss, claimant asserts that he specifically testified that he understood the notations on Mr. Hardin's task loss assessment sheets and confirmed that Mr. Hardin's description of the claimant's tasks performed for respondent were thorough and accurate. Claimant also argues that the factual situation in *Casco* is distinguishable from the facts in this claim because the claimant herein suffered simultaneous injuries to his bilateral upper

[1] *Casco v. Armour Swift-Eckrich*, ___ Kan. ___, 154 P.3d 494, *reh. denied* (2007).

extremities whereas Casco's right upper extremity injury was the result of overcompensation for the injured left upper extremity. Accordingly, claimant requests that the Award entered by the SALJ be affirmed. In the event the Board rules that *Casco* is applicable to this case, then the claimant requests that the SALJ's Award be modified and increased to a permanent total award, as respondent failed to meet its burden of proof to rebut the presumption of permanent total disability. Finally, if the Board finds *Casco* is applicable, claimant reserves his right to raise any constitutional issues to an appellate court.

The issues for the Board's review are:

(1) Is respondent bound by its pretrial stipulation that May 16, 2005, is the date of accident? If not, what is claimant's date of accident?

(2) Did claimant suffer a subsequent intervening injury?

(3) Is claimant permanently and totally disabled?

(4) If claimant is not permanently and totally disabled, are claimant's injuries and resulting disabilities covered by the schedule contained in K.S.A. 44-510d?

(5) If claimant's injuries are not contained within the schedule but instead resulted in a permanent partial general disability, what is his wage and task loss?

(6) If claimant's injuries resulted in a general body disability, did claimant make a good faith effort to find appropriate employment post-accident?

(7) If claimant's injuries resulted in a general body disability and he failed to make a good faith effort to find employment, what is his ability to earn wages post-accident?

FINDINGS OF FACT

Claimant began working for respondent in 1982 as a production welder. The parties have stipulated that claimant met with personal injury by a series of accidents up to and including May 16, 2005. At that time, respondent was in the process of being sold, and claimant's supervisor told him that if he needed to get anything done, to do it before the sale took place. Claimant was having problem with bilateral shoulder, elbow, wrist, and hand pain, as well as cramping in his hands. On May 16, 2005, claimant went to respondent's Central Medical for treatment.

After claimant went to Central Medical, respondent placed claimant in a light duty position. Claimant's last day working for respondent was July 17, 2005, which was the day it was sold to Spirit. Claimant continued in the accommodated position until November 3, 2005, when he was told by Spirit that it could no longer accommodate his restrictions.

Claimant had no worsening of his symptoms or injuries after he was given the accommodated position by respondent.

Claimant's condition had been gradually getting worse up to the time he went to Central Medical. There he was given wrist braces and physical therapy. He was sent for nerve conduction studies in June 2005. In July 2005, respondent sent him to Dr. John Estivo. Dr. Estivo diagnosed claimant with impingement syndrome of the right shoulder and right and left wrist sprain. He sent claimant to occupational therapy, gave him some injections in the shoulders, and prescribed a TENS unit. Dr. Estivo gave claimant permanent restrictions of a 40-pound weight limit, no continuous use of vibrating tools, and limited overhead work. Claimant saw Dr. Estivo again in December 2005, at which time he suggested the possibility of surgery on one of claimant's shoulders, but claimant said he would rather put surgery off. As a result, Dr. Estivo released claimant from treatment.

Dr. Michael Munhall, who is board certified in physical medicine and rehabilitation and is a certified independent medical examiner, examined claimant on September 20, 2005, at the request of claimant's attorney. Upon examination of claimant, Dr. Munhall found tenderness on palpation to the right mid dorsal wrist that aggravated with resisted rotation. There was positive stress loading, with popping but no clicking during testing in the right wrist. There was loss of right radial wrist deviation. On the left upper extremity, there was left wrist pain aggravated by resisted rotation, positive stress test with no clicking or popping, and loss of left radial wrist deviation.

Dr. Munhall diagnosed claimant with right wrist pain with a right triangular fibroid cartilage tear at the right wrist. He also diagnosed claimant with left wrist pain. Dr. Munhall opined that claimant's problem were a result of work-related injuries working for respondent up to and including May 16, 2005.

Dr. Munhall stated in his report that "there is a causal relationship between [claimant's] diagnoses and the injuries in evolution, May 2005, and each and every working day during employment at Boeing Aircraft Company/Spirit."[2] When testifying, Dr. Munhall stated that in his history, claimant reported an injury to both hands, wrists, shoulders, and elbows, and then he changed jobs and described a right wrist injury in May 2005. Dr. Munhall did not know the last day claimant worked for respondent versus being employed at Spirit. He agreed that claimant told him he has residual right hand cramping that is aggravated with workplace activities and with driving. Dr. Munhall stated that claimant was aggravating his right-hand cramping condition by working. However, Dr. Munhall testified that the information from Central Medical dated May 16, 2005, reflected a history of intermittent right shoulder pain with a diagnosis of bilateral wrist problems.

[2] Munhall Depo., Ex. 2 at 4. Dr. Munhall later testified on redirect examination, page 33, that by indicating the name Boeing Aircraft Company/Spirit, he was merely trying to reflect to the best of his ability the name of the company.

Accordingly, it is Dr. Munhall's opinion that claimant's injuries date to May 2005, and he was not testifying about any work activities claimant performed after May 2005.

Dr. Munhall rated claimant's impairment based on the AMA *Guides*.[3] Regarding the loss of right wrist radial deviation, Dr. Munhall rated claimant as having a 2 percent right upper extremity impairment, which equated to a 1 percent whole person impairment. Regarding the loss of left wrist radial deviation, Dr. Munhall rated claimant as having a 2 percent left upper extremity impairment, which equated to a 1 percent whole person impairment. Using the Combined Values Chart, these combined for a 2 percent whole person impairment.

Dr. Munhall gave claimant permanent restrictions of no repetitive right or left upper extremity activity, including repetitive grasping, grabbing, and heavy grasping. He restricted claimant to maximum lifting, carrying, pushing, and pulling of 30 pounds, 10 pounds frequently. Claimant was to perform no right or left hand intensive labor or use vibratory tools.

Dr. Munhall reviewed a task list prepared by Jerry Hardin. Of the 13 tasks on the list, Dr. Munhall opined that claimant is unable to perform 9, for a task loss of 69 percent.

Jerry Hardin, a human resource consultant, interviewed claimant on September 14, 2005, at the request of claimant's attorney. Mr. Hardin prepared a list of 13 tasks that claimant performed in the 15-year period before claimant's date of injury of May 16, 2005. All the information used in the task list came from claimant. Mr. Hardin did not otherwise attempt to verify the accuracy of any of the information.

Mr. Hardin did not prepare a wage earning capability determination on claimant. However, Mr. Hardin testified that in looking at claimant's education and work experience, he believed claimant would be able to earn about $500 per week in the open labor market without violating his restrictions working at jobs such as a parts manager or parts clerk or working for a manufacturing company where he would not have to do heaving lifting. Mr. Hardin's best estimate as to what kind of fringe benefit package claimant could expect would be $125 per week. Mr. Hardin also testified that claimant should not be looking for jobs as a welder, because most welder positions fall into the heavy or medium category of work.

PRINCIPLES OF LAW

K.S.A. 44-534(a) states in part:

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[3] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Whenever the employer, worker, Kansas workers compensation fund or insurance carrier cannot agree upon the worker's right to compensation under the workers compensation act or upon any issue in regard to workers compensation benefits due the injured worker thereunder, the employer, worker, Kansas worker's compensation fund or insurance carrier may apply in writing to the director for a determination of the benefits or compensation due or claimed to be due.

K.A.R. 51-3-8 states in part:

(a) Before the first hearing takes place, the parties shall exchange medical information and confer as to what issues can be stipulated to and what issues are to be in dispute in the case. The following stipulations shall be used by the parties in every case:

QUESTIONS TO CLAIMANT

1. In what county is it claimed that claimant met with personal injury by accident? (If in a different county from that in which the hearing is held, then the parties shall stipulate that they consent to the conduct of the hearing in the county in which it is being held.)
2. Upon what date is it claimed that claimant met with personal injury by accident?

QUESTIONS TO RESPONDENT

3. Does respondent admit that claimant met with personal injury by accident on the date alleged?

. . . .

(c) The respondent shall be prepared to admit any and all facts that the respondent cannot justifiably deny and to have payrolls available in the proper form to answer any questions that might arise as to the average weekly wage. Evidence shall be confined to the matters actually ascertained to be in dispute. The administrative law judge shall not be bound by rules of civil procedure or evidence. Hearsay evidence may be admissible unless irrelevant or redundant.

. . . .

(e) Permission to withdraw admissions or stipulations shall be decided by the administrative law judge, depending on the circumstances in each instance.

K.S.A. 44-510c(a)(2) states:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both

> arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

In *Wardlow*[4], the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work. The court in *Wardlow* looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

In *Casco*[5], the Kansas Supreme Court stated:

> Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d.
>
> When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof, the calculation of the claimant's compensation begins with a determination of whether the claimant has suffered a permanent total disability. K.S.A. 44-510c(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c.
>
> When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, both legs, or any combination thereof and the presumption of permanent total disability is rebutted with evidence that the claimant is capable of engaging in some type of substantial and gainful employment, the claimant's award must be calculated as a permanent partial disability in accordance with the [*sic*] K.S.A. 44-510d.
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> K.S.A. 44-510e permanent partial general disability is the exception to utilizing 44-501d in calculating a claimant's award. K.S.A. 44-510e applies only when the claimant's injury is not included on the schedule of injuries.

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[4] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

[5] *Supra* note 1, Syl. ¶¶ 7, 8, 9, 10, 11.

K.S.A. 44-510c(a)(2) requires that the disability result from a single injury and that condition may be satisfied by the application of the secondary injury rule.

ANALYSIS

Claimant's Application for Hearing alleges he suffered repetitive use injuries to his bilateral upper extremities by a series of accidents "up to and including May 16, 2005."[6] At the June 12, 2006, Regular Hearing before Judge Klein, the following appears:

> THE COURT: What day is it claimed that claimant met with personal injury by accident?
>
> [Claimant's attorney]: Up to and including May 16, 2005.
>
> THE COURT: Does respondent admit claimant met with personal injury by accident on the dates alleged?
>
> [Respondent's attorney]: Yes.[7]

Terminal dates for the presentation of evidence were established as August 1, 2006, for claimant and September 1, 2006, for respondent. Respondent never requested leave of court to withdraw its stipulation. In fact, in its brief to the Board, respondent argues:

> Claimant attorney also complains that the injury at respondent was stipulated to up to and including May 16, 2005, and that respondent is somehow now violating that Stipulation by pointing to claimant's continuing injury at Spirit. Respondent is not violating the Stipulation concerning date of accident against respondent, and indeed stands by that Stipulation. However, respondent also argues the injury continued after May 16, 2005, after claimant went to work at Spirit. Claimant attorney's objection in this regard is without merit.[8]

The stipulation is inclusive of all days claimant worked for respondent and suffered repetitive use injuries at least until May 16, 2005. Claimant continued to work for respondent until July 17, 2005. The stipulation does not preclude respondent from alleging claimant suffered new accidents and injuries after May 16, 2005, after he stopped working for respondent. As to any alleged subsequent injury, respondent bears the burden of proof.

Claimant worked in only accommodated jobs after May 16, 2005, and the Board finds that those jobs did not cause a permanent worsening of his underlying condition.

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[6] Form K-WC E-1 Application for Hearing filed July 11, 2005.

[7] R.H. Trans. (June 12, 2006) at 3.

[8] Brief on Behalf of Respondent and Insurance Carrier at 3 (filed Mar. 28, 2007).

There was no intervening injury. All of claimant's permanent impairment is a direct and natural result of his employment with respondent through May 16, 2005.

There is no distinction to be drawn between injuries to bilateral upper extremities where the injuries are simultaneous versus those where the injury is to first one upper extremity and then to the other as a result of overcompensation. As the Kansas Supreme Court stated in *Casco*, by application of the secondary injury rule the injuries are treated the same as when the disability results from a single injury.[9] Nevertheless, *Casco* "explicitly overrule[d] *Honn* and its progeny as it relates to the parallel injury rule."[10] No combination of scheduled injuries, whether simultaneous, parallel, or otherwise, can transform a partial disability that is in the schedule of K.S.A. 44-510d to a permanent partial general disability under K.S.A. 44-510e.

There is no testimony or evidence that claimant is incapable of engaging in substantial gainful employment. To the contrary, claimant has worked post-accident and is continuing to seek employment. The work restrictions from the medical experts do not preclude claimant from employment in the open labor market. Mr. Hardin opined that claimant retains the ability to earn $625 per week within those restrictions. The presumption of permanent total disability in K.S.A. 44-510c(a)(2) is rebutted.

CONCLUSION

Claimant's date of accident is May 16, 2005. As a result of his accidents which ended on May 16, 2005, claimant has suffered a 2 percent permanent impairment of his right arm at the level of the forearm and a 2 percent permanent impairment to his left arm at the forearm level. Claimant is not entitled to an award based upon a permanent total disability as that presumption has been rebutted. Claimant is entitled to a permanent partial disability award based upon his percentages of functional impairment as two separate scheduled injuries at the 200-week level. As claimant's award is based upon the schedule in K.S.A. 44-510d, there can be no work disability. All other issues are moot.

Although the SALJ's Award finds the "attorney fee retainer is reasonable and approves such fee arrangement,"[11] the record does not contain a filed fee agreement between claimant and his attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.

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[9] *Supra* note 1, Syl. ¶ 11, slip op. at 15.

[10] *Id.*, slip. op. at 25.

[11] SALJ Award (filed Feb. 20, 2007) at 6.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge John C. Nodgaard dated February 20, 2007, is modified as follows:

Claimant is entitled to four weeks of permanent partial disability compensation, at the rate of $449 per week, in the amount of $1,796, for a 2 percent loss of use of the right forearm, making a total award of $1,796, all of which is due and owing and ordered paid in one lump sum less any amounts previously paid.

Claimant is also entitled to four weeks of permanent partial disability compensation, at the rate of $449 per week, in the amount of $1,796 for a 2 percent loss of use of the left forearm, making a total award of $1,796, all of which is due and owing and ordered paid in one lump sum less any amounts previously paid.

The Board adopts the other orders of the SALJ to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this _____ day of May, 2007.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Dennis L. Phelps, Attorney for Claimant
Eric K. Kuhn, Attorney for Respondent and its Insurance Carrier
John C. Nodgaard, Special Administrative Law Judge
Thomas Klein, Administrative Law Judge